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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 LEXAR HOMES, LLC, fka
8 HiLINE HOMES, LLC,¹

9 Plaintiff,

10 v.

11 JON PORT and MELISSA PORT,
12 husband and wife, and the marital
13 community, and A HOME
14 DOCTOR, INC., a Washington
corporation, dba REAL HOMES,

Defendants.

NO. CV-12-0416-JLQ

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT; DIRECTING ENTRY OF
JUDGMENT AND CLOSING OF FILE

15 BEFORE THE COURT is Defendants' Motion for Summary Judgment
16 (ECF No. 31), which is opposed by Plaintiff. For the reasons below, the court
17 grants the Motion and dismisses Plaintiff's claims in the Complaint.

18 **I. PROCEDURAL HISTORY**

19 On June 22, 2012, Plaintiff, Lexar Homes ("Lexar") filed a Complaint
20 which alleges that: 1) Defendant Jon Port obtained Lexar copyrighted drawings,

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22 ¹ Plaintiff's Complaint named the Plaintiff as "Lexar Homes, Inc, fka HiLine
23 Homes, Inc." Since the case was filed, Plaintiff's documents, without approval,
24 have changed the caption to "Lexar Homes, LLC...f/k/a HiLine Homes, Inc." The
25 record contains name change documents indicating that Lexar Homes, LLC was
26 formerly HiLine Homes, LLC. (ECF No. 40, Ex. 3). Both HiLine Homes, LLC and
27 a HiLine Homes, Inc have existed (ECF No. 40, Ex. 3)(2006 "Assignment of
28 Copyrights" between HiLine Homes, Inc and HiLine Homes, LLC). The court has
amended the caption of the case in order to accurately state the true name of the
Plaintiff.

1 plans and customer information by visiting the office of Lexar Homes and/or
2 requesting confidential information from employees and customers of Lexar
3 Homes; 2) Port asked a third party architect to copy Lexar's copyrighted drawings;
4 and 3) "the architect did copy drawings of Lexar Homes' plans that are virtually
5 identical to Lexar Homes' copyrighted architectural drawings except for minor
6 changes." (ECF No. 1). The Complaint asserts claims for copyright infringement,
7 "conversions," misappropriation of trade secrets, and intentional interference with
8 business relations. (ECF No. 1).

9 On September 20, 2012 Plaintiff moved for Temporary Restraining Order
10 (ECF No. 15) to restrain Defendants from holding an open house that same day.
11 The court denied the Motion. (ECF No. 22). On May 9, 2013, Defendants moved
12 for Summary Judgment asking the court to dismiss all the claims. Plaintiff's
13 Response addresses only the federal copyright infringement claim.

14 **II. FACTS**

15 **A. Parties**

16 Plaintiff Lexar Homes, LLC ("Lexar") is a homebuilder which prior to
17 October 27, 2010 operated as HiLine Homes, LLC ("HiLine"). HiLine opened a
18 franchise in Wenatchee, Washington in either 2008 or 2009, across the street from
19 the Defendant's office. (ECF No. 40, Ex. 3 [Interrogatories] at 2). Defendant
20 Jon Port is a competitor of Plaintiff, doing business as Real Homes in Wenatchee,
21 Washington since 2001. Real Homes markets and builds single family homes in
22 North Central Washington State. Prior to 2011, Port was a shareholder of
23 Defendant A Home Doctor, Inc.

24 **B. "Plan 2248"**

25 William Sundby, dba HiLine Homes received Certificates of Registration
26 from the United States Copyright Office, both effective November 17, 2009, for
27 two "architectural work" copyrights at the center of this dispute titled "Plan 2248"
28 (Reg. No. VA 1-704-952) and "Plan 2576" (Reg. No. VA 1-704-955). (ECF No.

1 40, Ex. 3). Though requested in discovery by Defendants, copies of the plans that
2 were submitted to the U.S. Copyright Office at the time of application for
3 registration could not be located by Plaintiff. (ECF No. 29, Ex. 5).

4 The Complaint alleges that Defendants infringed the copyright for Plan
5 2248. Although the Complaint contains no description nor mention of Plan 2576
6 (and there is no "Exhibit A" attached to the Complaint as referenced in ¶ 2.3), the
7 Plaintiff's Motion for Temporary Restraining Order alleged that Plan 2576 was
8 "identical" to Plan 2248, "other than the area used for the third garage bay in Plan
9 2248 is used as a family room in Plan 2576." (ECF No. 17 at 2).

10 Lexar claims to possess HiLine Home's former undivided one-half interest
11 "in any and all rights" in Plan 2248 and Plan 2576,² and claims its "Lexar Plan
12 2248" is the subject of the copyright protected home plan obtained by HiLine.

13 Lexar has a model home allegedly based upon the Plan 2248 at 136 Sun
14 Valley Drive, in Wenatchee.

15 Lexar has posted plans for Lexar Plan 2248 and Lexar Plan 2576 online.

16 **C. The "Amy Rose" Plan**

17 Defendants have filed the Declaration of Defendant Jon Port who states that
18 in 2003 he developed a new home design and "had [the] design drawn up" for a
19 2171 square foot home "based on a manufactured home 'triple wide' design with
20 which [he] was very familiar from [his] days selling manufactured homes." (ECF
21 No. 28). According to Port, after the design was completed, he named the floor
22 plan the "Amy Rose" after his sister, Amy Grams. Other designs he has are also
23 named after family members and friends.

24 Port has not identified whom he had draft the plan, nor disclosed any

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26 ² According to the document attached to the Declaration of Kevin Bromily
27 HiLine Homes, LLC transferred the other half interest in an assignment to HLSub,
28 LLC on October 20, 2010 pursuant to an Assignment and Assumption Agreement.
(ECF No. 40, Ex. 3). HLSub, LLC is not a named Plaintiff.

1 electronic stored information (ESI) or business records regarding the creation of
2 the design such as a purchase order, invoice, or correspondence with a house
3 designer. He claims, that despite his best efforts, he cannot locate any such
4 information. According to Port, the independent house designers he has used to
5 create his house plans are Al Pratt, Ryan Kelso, and Jerry Mulhall. Port testified
6 at his deposition that he inquired with Pratt and Kelso, and neither discovered
7 evidence of the creation of the Amy Rose design. The Declaration of Ryan Kelso
8 is consistent with Port's in that he states he searched and did not find the Amy
9 Rose and also does not recall creating it. (ECF No. 29, Ex. 6). Port testified he
10 did not even inquire with Mulhall, as he it is his belief he did not start using
11 Mulhall as a designer until the 2005-2006 timeframe, which he contends was after
12 he created the Amy Rose design. (ECF No. 40, Ex. 1).

13 The documentary evidence Defendants have come forward with to show
14 Defendants had the Amy Rose design prior to the 2009 copyright of Plan 2248, are
15 a birthday card and a flyer. Port's Declaration states that he recalls presenting his
16 sister a birthday card with a printed copy of the Amy Rose design on it at a family
17 gathering to celebrate her 40th birthday in the summer of 2004. (ECF No. 28, ¶
18 7). A copy of the birthday card, signed by Port and his wife, is attached to Port's
19 Declaration. Amy Gram's Declaration states she saved the document Port gave to
20 her in the summer of 2004 and provided the original to Port's attorneys for this
21 lawsuit. Port also claims that in 2004 and 2005, Real Homes printed flyers and
22 brochures to show potential customers the "Amy Rose" design. Attached to his
23 Declaration is a copy of one of the flyers advertising the "Amy Rose" design and
24 containing 2004 and 2005 deadlines for deposits and construction.

25 Although Defendant Real Homes has developed numerous designs for
26 single family homes, not all of those designs are built immediately. In 2011,
27 approximately eight years after he claims he created the design, Real Homes built
28 a model home using the Amy Rose design at 51 Sun Valley Drive in Wenatchee,

1 Washington. The 2011 blueprints were drawn by Jerry Mulhall and describe the
2 design as "Rose."

3 **D. Comparisons**

4 In late 2011 or early 2012, Jason Nieman was researching home designs and
5 comparing Lexar and Real Homes' designs. After touring Real Home's model
6 home, Nieman, notified Port of the similarity between the model home and Lexar's
7 Plan 2576. Defendants concede "the Lexar Plans have similar characteristics as
8 the Amy Rose plan." (ECF No. 31 at 2). Defendants' Declaration of designer
9 Ryan Kelso states similarities in house plans are common as "there is only so
10 much you can do with a box." (ECF No. 29, Ex. 6).

11 The parties each provide their own lay evidence as to the similarities and
12 differences between Plan 2248 and the Amy Rose. Port notes 24 differences.
13 (ECF No. 38, para. 11). Plaintiff has come forward with the Affidavit of Lexar's
14 owner, Rob Eldred, who in his side-by-side comparison noted 31 similarities.
15 (ECF No. 42, Ex. 3).

16 **III. STANDARD OF REVIEW**

17 Summary judgment is proper when "the pleadings, depositions, answers to
18 interrogatories, and admissions on file, together with affidavits, if any, show that
19 there is no genuine issue as to any material fact and that the moving party is
20 entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A "genuine issue"
21 of material fact will be absent if, "viewing the evidence and inferences which may
22 be drawn therefrom in the light most favorable to the adverse party, the movant is
23 clearly entitled to prevail as a matter of law." *Jones v. Halekulani Hotel, Inc.*, 557
24 F.2d 1308, 1310 (9th Cir. 1977); *see also Baldwin v. Trailer Inns, Inc.*, 266 F.3d
25 1104, 1117 (9th Cir. 2001). The evidence presented by the parties must be
26 admissible. Fed.R.Civ.P. 56(e). Conclusory and speculative testimony in affidavits
27 and moving papers is insufficient to raise genuine issues of fact and to defeat
28 summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738

1 (9th Cir. 1979).

2 The party seeking summary judgment bears the initial burden of informing
3 the court of the basis for its motion and identifying those portions of the pleadings,
4 depositions, answers to interrogatories, and admissions on file, together with the
5 affidavits, if any, which it believes demonstrate the absence of any genuine issue
6 of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On issues
7 where the nonmoving party will have the burden of proof at trial, the moving party
8 may meet its burden by showing that there is an "absence of evidence" to support
9 the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. The nonmoving party
10 then must designate specific facts showing that there is a genuine issue for trial.
11 *See id.* at 324. The party opposing summary judgment must present more than a
12 "mere scintilla" of evidence; the evidence must be such that a reasonable jury
13 could find in favor of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
14 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) Summary judgment is appropriate
15 against a party who "fails to make a showing sufficient to establish the existence
16 of an element essential to that party's case, and on which that party will bear the
17 burden of proof at trial." *Id.* at 322; *Matsushita Elec. Indus. Co. v. Zenith Radio*
18 *Corp.*, 475 U.S. 574, 586 (1986) (nonmovant's showing of "some metaphysical
19 doubt" as to material facts insufficient); *see also Citadel Holding Corp. v. Roven*,
20 26 F.3d 960, 964 (9th Cir.1994).

21 **IV. DISCUSSION**

22 **A. Copyright Infringement**

23 Copyright laws only prohibit actual copying. A copyright infringement
24 claim has two elements: (1) ownership of a valid copyright; and (2) copying of
25 constituent elements of the work that are original. *Feist Publications, Inc. v. Rural*
26 *Telephone Service Co.*, 499 U.S. 340, 361 (1991). The ultimate burden of
27 persuasion on these two elements rests with the Plaintiff.

28 In the case at hand, Defendants challenge Plaintiff's ability to make out a

1 prima facie case. Primarily, Defendants deny copying Plaintiff's design and assert
2 the Amy Rose design was independently created. Defendants also assert a chain-
3 of-title type challenge contending that Plaintiff cannot establish its "Lexar Plan
4 2248" is the same plan which is the subject of the 2009 copyright registration for
5 "Plan 2248" assigned to Plaintiff by HiLine Homes LLC. Where a defendant
6 denies an element of the case, the burden of production shifts to the defendant to
7 support its denial by a preponderance of the evidence. *Granite Music Corp. v.*
8 *United Artists Corp.*, 532 F.2d 718, 723 (9th Cir. 1976).

9 A work is considered "copied" under the Copyright Act when it is "so
10 overwhelmingly identical that the possibility of independent creation is
11 precluded." *Twentieth Century Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1237, 1330
12 (9th Cir. 1983). Typically, there will be no direct evidence that an infringement
13 defendant copied the plaintiffs work. A plaintiff may instead create a presumption
14 of copying "by showing that the infringer had access to the work and that the two
15 works are substantially similar." *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir.
16 1990) (citing *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989)). By
17 establishing reasonable access and substantial similarity, the burden of production
18 then shifts to the defendant to rebut that presumption through proof of
19 independent creation. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th
20 Cir. 2000) (citing *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721
21 (9th Cir. 1976)).

22 Defendants seek summary adjudication based upon the un rebutted sworn
23 declarations of Jon Port and his sister, corroborated by documentary proof in a
24 birthday card and a flyer. This evidence shows the allegedly infringing pattern was
25 in Defendants' possession years prior to the 2009 date Plan 2248 was authored and
26 copyrighted. Plaintiff's Summary Judgment Response does not discuss the
27 elements of its prima facie case. Instead it relies *solely* upon "numerous
28 similarities" it identified between the two plans to defeat Defendants' motion.

1 Plaintiff has presented no evidence, expert or otherwise, tending to show that the
2 allegedly infringing pattern could only have been derived from copyrighted Plan
3 2248. Yet Plaintiff opines that *Defendants'* evidence is too weak because they
4 didn't identify the creation date or drafter of the plan, and therefore it is "not
5 sufficient...to prevail" either on summary judgment or at trial. (ECF No. 41 at 3).

6 Though the lack of an electronic paper trail might raises legitimate
7 questions concerning conduct in discovery, now over, a respondent to a motion for
8 summary judgment may not defeat the motion by solely speculating that the
9 movant's evidence may not be credible. Rather, the non-moving party "must be
10 able to point to some facts which may or will entitle him to judgment, or refute the
11 proof of the moving party in some material portion, and. . .may not merely recite
12 the incantation, 'Credibility,' and have a trial on the hope that a [trier of fact] may
13 disbelieve factually uncontested proof." *Fogerty v. MGM Group Holdings Corp.,*
14 *Inc.*, 379 F.3d 348, 353-54 (6th Cir. 2004).

15 If an accused work was created independently, it does not infringe a
16 copyrighted work, no matter how great the similarity between the two.
17 Accordingly, Plaintiff's evidence of "numerous similarities" to their product alone
18 cannot lead to a finding of copying, without evidence of access to its copyrighted
19 plan prior to the Amy Rose's creation. "[T]he originality necessary to support a
20 copyright merely calls for independent creation, not novelty.... The protection is
21 thus against copying-not against any possible infringement caused when an
22 independently created work coincidentally duplicates copyrighted material." *Roth*
23 *Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109-10 (9th Cir.1970); *see*
24 *also Selle v. Gibb*, 741 F.2d 896 (7th Cir.1984) (stating that "two works may be
25 identical in every detail, but, if the alleged infringer created the accused work
26 independently or both works were copied from a common source in the public
27 domain, then there is no infringement").
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1 Under the circumstances presented here, the court finds Defendants'
2 unrefuted sworn testimony corroborated by documentary evidence that the Amy
3 Rose was in Defendants' possession years (2004-2005) prior to the creation of the
4 2009copyrighted plan, is sufficient to support summary judgment. *See, e.g.,*
5 *McGaughey v. Twentieth Century Fox Film Corp.*, 12 F.3d 62, 64–65 (5th
6 Cir.1994) (finding in copyright case that the defendants could not have infringed
7 the plaintiff's copyright because writer of allegedly infringing script had
8 completed his work prior to the defendant's receipt of the plaintiff's work). Such
9 prior creation "renders any conclusion of access or inference of copying illogical."
10 *Grubb v. KMS Patriots, L.P.*, 88 F.3d 1 (1st Cir. 1996). The essential element of
11 copying is not established. Because Plaintiff bears the burden of proof,
12 Defendants have satisfied their burden under Rule 56 by showing "that there is an
13 absence of evidence to support [an essential element of] the nonmoving party's
14 case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

15 **B. State Law Claims**

16 Defendants' Motion for Summary Judgment also seek dismissal of
17 Plaintiff's state law claims for conversion, misappropriation of trade secrets, and
18 intentional interference with a business expectancy. A district court may, at its
19 discretion, decline to exercise supplemental jurisdiction over remaining state law
20 claims where it has dismissed all claims over which it has original jurisdiction. 28
21 U.S.C. § 1367(c)(3). However, as Plaintiff does not contest the dismissal of these
22 claims, the interests of economy suggest it would be prudent for the court to
23 proceed to rule on these claims.

24 Plaintiff's conversion and trade secret claims, to the extent they are based
25 upon rights associated with the copyrighted architectural plans, are preempted by
26 the Copyright Act. See 17 U.S.C. § 301. Plaintiff has failed to present any
27 evidence of the alleged receipt or use of customer contact information or
28 interference of a business relationship or expectancy. Accordingly, Defendants'

1 Motion for Summary Judgment as to Plaintiff's remaining claims shall be granted.

2 **V. CONCLUSION**

3 For these reasons described above, Defendants' Motion for Summary
4 Judgment (ECF No. 31) is **GRANTED**. ACCORDINGLY, the District Court
5 Executive is directed to file this Order, enter JUDGMENT dismissing the
6 Complaint (ECF No. 1) and the claims therein with prejudice, provide copies to
7 counsel, and CLOSE THE FILE.

8 All pretrial and trial dates are stricken.

9 DATED this 21st day of June, 2013.

10 s/ Justin L. Quackenbush
11 JUSTIN L. QUACKENBUSH
12 SENIOR UNITED STATES DISTRICT JUDGE
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